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DIVERSITY IN THE BOARDROOM: A CONTENT ANALYSIS OF CORPORATE PROXY DISCLOSURES

Aaron A. Dhir*

This Symposium, and its focus on “Comparative Sex Regimes and Corporate Boards”, could not come at a more appropriate time. It explores a core location of power in the global marketplace: the corporate boardroom.¹ It also considers the boardroom, through the lens of socio-demographic composition, as a site of contestation; as a place of identity formation, social closure, and social struggle. Internationally, in addition to intra-firm and civil society-based initiatives, states and regulators – dissatisfied with the existing homogenous landscape – have turned to formal ameliorative measures in an effort to facilitate diversification. Other jurisdictions, at the time of writing, are currently in the process of debating the efficacy and possible use of similar strategies.

The quota-based path, originating in Norway, has now been replicated in varying forms elsewhere in Europe. It mandates certain levels of representation (exclusively vis-à-vis gender) in the boardroom and can be seen as a form of command-and-control regulation. The relationship between regulator and regulatee is hierarchical and predicated on a deterrence-based logic. A second path, however, pursued in corporate governance codes, principles, and guidelines – and in formal securities law – is a marked departure from the Norwegian positive discrimination model. Under the disclosure model, the state’s intervention is less severe. Rather than dictating a predetermined outcome that must be achieved, this path – which has taken on different forms – asks regulated entities to publicly report on diversity-related governance information. The U.S. diversity disclosure rule, enshrined in 2010 by the Securities and Ex-

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¹ “Boardroom – the word alone conjures up visions of power, wealth, and privilege. . .” JAY W. LORSCH & ELIZABETH MACIVER, PAWNS OR POTENTATES: THE REALITY OF AMERICA’S CORPORATE BOARDS 1 (1989).

change Commission, illustrates this approach. It requires registrants to report the following information:

“Describe ... whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy”.²

Disclosure is best understood as a form of decentered, new governance regulation. Here, the state is no longer the nucleus of the regulatory space. Rather, it forms but one part of a pluralistic regulatory encounter where the regulated entity and other non-state actors also contribute to the formulation of an overall normative ordering. In the first path, the regulation of corporate governance diversity takes place at the state’s behest; in the second, it takes place more in the state’s shadow.³

My work in this field has focused on both forms of regulation. With regard to quotas, strikingly, the Norwegian law is not located in regulation that explicitly deals with human rights or equality issues; rather, it is found in the heart of the legal regime that gives life and personality to corporations – in Norwegian corporate law. I have conducted qualitative, interview-based research with Norwegian corporate directors, both men and women. It is only through understanding how the goals of the law have translated into the day-to-day existence of these individuals that we can begin to consider the “big picture” questions that accompany the quota-based approach.

With regard to disclosure, I have chosen to focus on the U.S. as a second case study for four principal reasons. First, similar to the Norwegian law, the site that houses the U.S. rule is noteworthy. Once again, it is not found in regulation that focuses on anti-discrimination etc...; rather, it is located in the heart of the legal regime that governs the public issuance of shares – in U.S. securities law. Second, and related to the first, the U.S. rule (like the Norwegian law) has been controversial, painted by some as an unjustified intervention into market ter-

² SEC, Proxy Disclosure Enhancements, Securities Act Release No. 33-9089 115-116 (Dec. 16, 2009).

³ The shadow metaphor was recently used to great effect in MARC T. MOORE, *CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE* (2013).

rain and as being in tension with the underlying purpose of securities regulation. Third, quite simply, U.S. markets represent the biggest share of overall global market capitalization.⁴ Fourth, I am mindful of the argument of scholars such as Schuck that there is something special – something unique – about the U.S.'s historical engagement with the idea of diversity.⁵

My inquiry into the U.S. approach begins with an overview of its conceptual underpinnings. I then explore reactions to the rule and consider whether, in promulgating it, the SEC acted reasonably, or if it strayed significantly from its mandate. From there, I use a mixed-method, qualitative–quantitative content analysis to investigate the micro-dynamics of this approach. I take an initial temperature reading of corporate articulations of diversity under the first years of the rule. These articulations are particularly fascinating given that the SEC does not provide firms with a definition of the term “diversity”.

The specific results of my study are forthcoming.⁶ Overall, it establishes that the concept of diversity carries multiple connotations for U.S. corporations. However, perhaps its most salient finding is that, when left to their own devices (i.e. in the absence of regulatory guidance), firms most frequently think in experiential terms and focus on a director's prior experience, or knowledge and skills — rather than in socio-demographic terms with an eye to gender or racial diversity. As I have reported elsewhere, only approximately half of firms in my sample fell into the latter camp.⁷

How are we to receive this finding? What are its broader

⁴ See the World Bank statistics compiled in, *Top 20 Nations Listed by Stock Market Cap (In Billions)*, August 25, 2013, available at <http://blogs.law.harvard.edu/willbanks/2013/08/25/top-20-nations-listed-by-company-market-cap/>.

⁵ As it relates to race and ethnicity. See PETER H. SHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 14 (2003) (“The belief in the diversity ideal, then, appears to be a distinctively, if not uniquely, American (or at least North American) theme.”).

⁶ In a book manuscript under contract with Cambridge University Press, provisionally titled *Challenging Boardroom Homogeneity: Corporate Law, Governance and Diversity*. Manuscript is on file with author.

⁷ Aaron A. Dhir, *Boardroom Diversity and Disclosure: A Nudge in the Right Direction?*, THE TORONTO STAR, May 31, 2013, available at http://www.thestar.com/opinion/commentary/2013/05/31/boardroom_diversity_and_disclosure_a_nudge_in_the_right_direction.html.

implications?

For firms, related experience is an attractive criterion given that it may provide knowledge of industry nuances and competition, sources of strategic advantage, and a broader network. Industry expertise has also been linked to meaningful boosts in firm value.⁸ Further, while the literature is mixed, certain studies that find a positive relationship between firm value and board diversity more broadly suggest that experiential diversity may result in a more robust positive financial outcome as compared with socio-demographic diversity.⁹ Moreover, and most significantly, unlike identity-based characteristics, experience is a predictable, traditional variable that fits within most standard conceptions of what it means to be qualified.

That said, a key issue for many observers, including a number of large institutional investors, is whether the SEC rule will facilitate intra-organizational change and eventually have the effect of increasing levels of socio-demographic representation on corporate boards. Indeed, my study notes that the representation of women and racial/ethnic minorities was the primary concern of those who responded to the SEC's original request for comments on a potential diversity disclosure provision.

In the future, when the rule has been in effect for a longer period of time, and a more voluminous data set exists, a comprehensive study on the causal or correlative relationship between the rule and diversity levels after its implementation will be of great assistance in evaluating the effectiveness of this strategy¹⁰ — as will a study of how the diversity discourses

⁸ Olubunmi Faleye, *et al.*, *Industry Expertise on Corporate Boards*, July 25, 2012, at 1, 36, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117104; see also Wolfgang Drobetz, *et al.*, *Is Director Industry Experience a Corporate Governance Mechanism?*, April 25, 2013, at 2, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256477. (“Our findings confirm that boards with a higher fraction of directors with experience in the respective firm’s industry are associated with higher firm values”).

⁹ Ronald C. Anderson *et al.*, *The Economics of Director Heterogeneity*, 40 FIN. MGMT. 5, 27 (2011); *but see*, in the Australian context, Stephen Gray & John Nowland, *Professional Expertise and Board Diversity*, Jan. 17, 2014, at 24 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2289689 (“[o]verall, we find no relationship between professional expertise diversity and firm value”).

¹⁰ Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 UNIV. OF DAYTON L. REV. 39, 73-74 (2011).

change with time. In the meantime, my study's preliminary finding that, to date, social identity categories are overshadowed in the discourse serves as a caution that the intended result under new governance-style thinking may not be materializing. In other words, while the rule has achieved some laudable results, there is reason to be concerned that it is not living up to its full, anticipated potential.

In my forthcoming work, I paint a picture of why that might be. I contend that the rule as currently formulated can be expected to produce meaningful change only if diversity is internalized as a social norm within corporate governance cultures. Since, I argue, that has not yet occurred, the results of the content analysis can be expected to replicate themselves going forward. That said, drawing on the literature on law and norms, and the expressive function of law, I posit that the rule, if redesigned, has at least the potential to alter existing norms and therefore to possibly modify corporate behavior.

In that vein, I hope that my work will deepen the international policy conversation and inform the on-going global debate. I am particularly mindful of, and interested in, the quickly-evolving regulatory landscape in Canada. In many ways, Canada is a compelling site of inquiry. Canadian "bijuralism" – the existence and interaction of both common and civil law legal cultures – is rooted in its historical colonization by Great Britain and France. But while Canadian political and legal cultures are strongly influenced by these European countries, its proximity to the U.S. has had an immeasurable impact. As Trudeau once quipped: "[l]iving next to you is in some ways like sleeping with an elephant. No matter how friendly and even-tempered the beast, if I can call it that, one is affected by every twitch and grunt."¹¹

This sentiment holds especially true in relation to corporate governance. While the Canadian regime draws from both the English model and the norms of its neighbor to the South,¹² the latter's influence cannot be understated, particularly in recent years. A 2012 empirical study on the voluntary adoption of corporate governance practices strikingly found that "[w]hen

¹¹ ARTHUR ANDREW, *THE RISE AND FALL OF A MIDDLE POWER: CANADIAN DIPLOMACY FROM KING TO MULRONEY* 97 (1993).

¹² Andrew MacDougall et al., *Canada* in *THE CORPORATE GOVERNANCE REVIEW* 34 (Willem J.L. Calkoen, ed. 2012).

given the choice, [Canadian] firms voluntarily adopt U.S. standards rather than Canadian guidelines, regardless of whether they are cross-listed.”¹³

As it stands, the Canadian landscape exhibits the initial signs of both regulatory approaches discussed above.¹⁴ In Quebec, the only province whose legal system is rooted in the French civil law tradition, a quota law exists for state-owned enterprises. Effective December 2011, boards of these firms must consist of “an equal number of women and men”.¹⁵ Taking this philosophy one step further, a Liberal Party Senate bill, introduced by a senator from Quebec, seeks *inter alia* to require the boards of all federally incorporated corporations and various financial institutions to have at least forty percent representation of both women and men.¹⁶

On the other hand, the province of Ontario, described by one political scientist as “English Canada's political and cultural hegemon”¹⁷ appears to be moving in a different direction. As part of its 2013 budget, Ontario's Liberal government declared its support for increased gender representation in governance.¹⁸ It subsequently requested the Ontario Securities Commission to begin a process to consider a provincial “comply-or-explain” diversity disclosure strategy.¹⁹ This resulted in a

¹³ Anita I. Anand et al., *Domestic and International Influences on Firm-Level Governance: Evidence from Canada*, 14 AM. ECON. REV. 68, 107 (2012).

¹⁴ See *id.*

¹⁵ An Act Respecting the Governance of State-Owned Enterprises, R.S.Q. 2014, c. C-43 (Can.).

¹⁶ See An Act to modernize the composition of the boards of directors of certain corporations, financial institutions and parent Crown corporations, and in particular to ensure the balanced representation of women and men on those boards, 2011, 41st Parl., 1st Session, Bill [S-203] cl. 2 (Can.). This assumes a board of more than 8 members. For boards with 8 or fewer members, the Bill stipulates, “the difference between the number of directors of each sex may not be greater than two.” *Id.* While this last iteration of the Bill did not become law, the Senator plans to reintroduce it in the Canadian Senate.

¹⁷ Nelson Wiseman, *In Search of Canadian Political Culture* (Vancouver: University of British Columbia Press, 2007) at 8.

¹⁸ CHARLES SOUSA, A PROSPEROUS & FAIR ONTARIO: 2013 ONTARIO BUDGET 291 (Queen's Printer for Ontario, 2013), *available at* www.fin.gov.on.ca/en/budget/ontariobudgets/2013/papers_all.pdf.

¹⁹ *Women in Leadership*, ONTARIO WOMEN'S DIRECTORATE, <http://www.women.gov.on.ca/english/recognizing/index.shtml> (last visited June 20, 2013).

consultation paper²⁰ and a public roundtable in October 2013, intended to inform the regulator's on-going deliberations.²¹ I am especially hopeful that my study's insights will be of assistance to Canadian policy-makers as they advance in navigating this complicated and controversial terrain, with the end goal of moving towards more inclusive governance architectures. It is a terrain where key social institutions and phenomena – business corporations, legal governance, and diversity – are entangled and are constantly forming and reforming one another in an on-going dialogue.

²⁰ ONTARIO SECURITIES COMMISSION, OSC STAFF CONSULTATION PAPER 58-401: DISCLOSURE REQUIREMENTS REGARDING WOMEN ON BOARDS AND IN SENIOR MANAGEMENT (2013), *available at* www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20130730_58-401_disclosure-requirements-women.pdf.

²¹ *OSC Roundtable on Women on Boards*, ONTARIO SECURITIES COMMISSION (Sept. 2013), https://www.osc.gov.on.ca/documents/en/Investors/inv_news_20130930_roundtable-women-boards.pdf. I participated in this roundtable as an invited panelist.